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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CHING LUNG HSU et al.,

Petitioners,

v.

THE SUPERIOR COURT OF
RIVERSIDE COUNTY,

Respondent;

RIVERSIDE COUNTY
TRANSPORTATION COMMISSION et
al.,

Real Parties in Interest.

E059826

(Super.Ct.No. RIC10014447)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Matthew C.

Perantoni, Judge. Petition granted in part; denied in part.

Barry A. Ross for Petitioners.

No appearance for Respondent.

Best Best & Krieger, Mark A. Easter and Scott W. Ditfurth for Real Parties in Interest.

In this matter we have reviewed the petition and the opposition thereto, which we conclude adequately address the issues raised by the petition. We have determined that resolution of the matter involves the application of settled principles of law and, furthermore, that issuance of an alternative writ of mandate would cause undue delay in bringing the action to trial. We therefore issue a peremptory writ in the first instance. (Code Civ. Proc., § 1088; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178-179; *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1222-1223.)

In a nonpublished opinion (*Ching Lung Hsu v. Riverside County Transportation Commission* (May 22, 2013, E054922)), this court reversed the superior court's order granting summary judgment in favor of the defendants, real parties in interest. Our opinion directs that, "On remand, the trial court is directed to consider [petitioners'] request for attorney fees under [Code of Civil Procedure¹] section 1036." Petitioners were also awarded their costs on appeal.

After issuance of the remittitur, petitioners filed a memorandum of costs on appeal, as well as a motion for attorney fees under section 1036.

The trial court denied the request for attorney fees, finding that the request was premature because no judgment had been entered. It also denied petitioners' costs on appeal.

¹ Statutory references are to the Code of Civil Procedure.

Petitioners contend that their motion for attorney fees and memorandum of costs were not premature because it was made within the time provided for in the California Rules of Court.

However, the rules merely provide procedures to claim attorney fees and costs to the extent they are recoverable. With respect to costs on appeal, California Rules of Court, rule 8.278, provides that the prevailing party in a civil case is entitled to costs on appeal unless the Court of Appeal orders otherwise. Here, this court directed that petitioners would recover costs on appeal. We conclude, therefore, that the trial court erred in denying petitioners' timely application for costs on appeal.

The recovery of attorney fees in an inverse condemnation case is governed by section 1036, which reads in pertinent part as follows: "In any inverse condemnation proceeding, the court rendering *judgment for the plaintiff by awarding compensation . . .* shall determine and award or allow to the plaintiff, as a part of that judgment or settlement, a sum that will, in the opinion of the court, reimburse the plaintiff's reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of that proceeding in the trial court or in any appellate proceeding in which the plaintiff prevails on any issue in that proceeding." Under this section, a plaintiff in an inverse condemnation action may recover attorney fees only when he obtains a judgment or settlement. Although this court reversed summary judgment in favor of real parties in interest, petitioners may not ultimately prevail. The trial court concluded correctly that petitioners were not yet entitled to

recover attorney fees because they had not recovered a judgment. (Cf. *Presley of Southern California v. Whelan* (1983) 146 Cal.App.3d 959, 963 [plaintiff not entitled to contractual attorney fees under § 1717 for prevailing on appeal from grant of summary judgment motion because the appeal does not decide who wins the lawsuit].)

Petitioners argue that attorneys fees authorized by statute are recoverable as costs under section 1033.5, subdivision (a)(10)(B). Even if considered as costs, this provision does not determine when those fees are recoverable. Section 1036 is the specific statute providing for an award of fees and it does not authorize attorneys fees unless and until petitioners *ultimately* prevail.

Finally, we observe that our opinion merely directed the trial court to *consider* petitioners' request for attorneys fees under section 1036. We did not direct the lower court to grant petitioners' request for fees.

DISPOSITION

The petition for writ of mandate is granted in part and denied in part. Let a peremptory writ of mandate issue directing the Superior Court of Riverside County to set aside its order denying petitioners' request for costs on appeal and motion for attorney fees under section 1036 and to issue a new order granting the petitioners' costs on appeal only. In all other respects the petition is denied.

Petitioners are directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

The parties are to bear their own costs.

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RICHLI
J.

We concur:

McKINSTER
Acting P. J.

KING
J.